Supreme Court, U.S.
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No. 95-1435

In The

Supreme Court of the United States

October Term, 1995

In re ESTATE OF BOBBY NOAH GRAVEN,
In re ESTATE OF MILLIE ANN GRAVEN, deceased

GRAVEN AUCTION CO., INC., GRAVEN REALTY, INC.
and BOBBY F. GRAVEN, Trustee for the
BOBBY N. GRAVEN TRUST,

Petitioners,

vs.

RICHARD V. FINK, Trustee,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT WHICH PETITIONERS SEEK TO HAVE REVERSED IS *IN RE GRAVEN*, 936 F.2d 378 (8TH CIR. 1991) AND NOT THE OPINION OF THE COURT OF APPEALS INVOLVED IN THE CURRENT APPEAL AND BECAUSE PETITIONERS WERE NOT PARTIES TO AND DO NOT HAVE THE RIGHT TO CONTEST SUCH PRIOR DECISION AND BECAUSE THE COURT OF APPEALS' OPINION *IN RE GRAVEN*, 936 F.2d 378 (8TH CIR. 1991) WAS AND IS CORRECT.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS WERE NOT DEPRIVED OF THEIR RIGHT TO DUE PROCESS AND TO A FAIR TRIAL, PETITIONERS FAILED TO RAISE SUCH ISSUES IN THE LOWER COURTS, AND CONCURRENT FINDINGS OF FRAUD HAVE NOW BEEN MADE BY THREE LOWER COURTS AND THIS COURT SHOULD THEREFORE NOT REVIEW SUCH FINDINGS OF FACT.

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STATEMENT OF JURISDICTION

This case originated in the United States Bankruptcy Court for The Western District of Missouri which obtained jurisdiction over the Debtors upon their filing of a Voluntary Petition in Bankruptcy under Chapter 12. The bankruptcy case was subsequently converted to Chapter 7.

The Trustee then filed an adversary action against the Debtors, the Petitioners herein, and others, over which the Bankruptcy Court exercised jurisdiction pursuant to 28 U.S.C. §157. The Bankruptcy Court entered a Memorandum Opinion and Judgment dated February 8, 1993, in such adversary. The Notice of Appeal was filed by Petitioners on February 18, 1993. The United States District Court for The Western District of Missouri, Southern Division, Judge Scott O. Wright presiding, exercised jurisdiction over the appeal pursuant to 28 U.S.C. §158(a) and affirmed the Bankruptcy Court's decision in a Judgment and Order dated May 9, 1994.

A Notice of Appeal was then filed by Petitioners on June 7, 1994. The United States Court of Appeals for the Eighth Circuit, exercising jurisdiction pursuant to 28 U.S.C. §158(d) affirmed the District Court in an Opinion and Judgment dated September 5, 1995. A Petition for Rehearing was filed on September 18, 1995, and denied in an Order dated October 10, 1995. A Petition for a Writ of Certiorari was mailed January 8, 1996, by Petitioners but returned by the clerk on January 19, 1996, for failure to comply with the Supreme Court Rules. Petitioner again served a Petition for a Writ of Certiorari on Respondent's

Counsel on March 5, 1996. This court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

11 U.S.C. §303. Involuntary cases

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title-

> (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least $10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;
>
> (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549 or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $10,000 of such claims;

(3) if such person is a partnership-

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or

(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

(e) After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.

(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced.

(g) At any time after the commencement of an involuntary case under chapter 7 of this title but before an order for relief in the case, the court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve the property of the estate or to prevent loss to the estate, may order the United States trustee to appoint an interim trustee under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires, conditioned on the debtor's accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of such property.

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if-

> (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute; or
>
> (2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment-

(1) against the petitioners and in favor of the debtor for-

(A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioner that filed the petition in bad faith, for-

(A) any damages proximately caused by such filing; or

(B) punitive damages.

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section-

(1) on the motion of a petitioner;

(2) on consent of all petitioners and the debtor; or

(3) for want of prosecution.

(k) Notwithstanding subsection (a) of this section, an involuntary case may be commenced against a foreign bank that is not engaged in such business in the United States only under chapter 7 of this title and only if a foreign proceeding concerning such bank is pending.

11 U.S.C. §1112 Conversion or dismissal

(c) The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a farmer or a corporation that is not a moneyed, business, or commercial corporation, unless the debtor requests such conversion.

11 U.S.C. §1208 Conversion or dismissal

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.

(b) On request of the debtor at any time, if the case has not been converted under section 706 or 1112 of this title, the court shall dismiss a case under that chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

(c) On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including-

(1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees and charges required under chapter 123 of title 28;

(3) failure to file a plan timely under section 1221 of this title;

(4) failure to commence making timely payments required by a confirmed plan;

(5) denial of confirmation of a plan under section 1225 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) material default by the debtor with respect to a term of a confirmed plan;

(7) revocation of the order of confirmation under section 1230 of this title, and denial of confirmation of a modified plan under section 1229 of this title;

(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; or

(9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation.

(d) On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case.

(e) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

11 U.S.C. §1307 Conversion or dismissal

(e) The court may not convert a case under this chapter to a case under chapter 7, 11, or 12 of this title if the debtor is a farmer, unless the debtor requests such conversion.

28 U.S.C. §157 Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to-

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interest for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration

of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

28 U.S.C. §158 Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

. . .

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and

decrees entered under subsections(a) and (b) of this section.

28 U.S.C. §1254 Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods;

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

STATEMENT OF THE CASE

Debtors, Bobby N. Graven and Millie A. Graven, filed a Voluntary Petition under Chapter 12 of the Bankruptcy Code on November 12, 1987. The Debtors thereafter filed a Plan of Reorganization and a confirmation hearing on such plan was set for March 2, 1988. Several Creditors objected to the proposed plan and the Bankruptcy Court, Judge Frank W. Koger presiding, issued an order on March 23, 1988, directing the Trustee, Richard V. Fink, to conduct an investigation into the affairs of the Debtors. *In re Graven*, 84 B.R. 630 (Bankr. W.D. Mo. 1988).

The Trustee filed a preliminary report and a supplemental preliminary report with a hearing on such reports set for January 24, 1989. The Debtors, at such hearing, filed an Application for Voluntary Dismissal pursuant to 11 U.S.C. §1208(b). Thereafter, the Trustee filed the Trustee's Motion to Convert Case requesting the Court to convert the case to a case under Chapter 7 of Title 11 on February 10, 1989.

A hearing on the Application for Voluntary Dismissal and the Trustee's Motion to Convert Case was held on April 10, 1989, and resulted in a memorandum opinion dated May 23, 1989, in which the Bankruptcy Court granted the Motion to Convert Case to Chapter 7 and held that the Debtors' Motion to Dismiss was therefore moot. (App. p. 102a)[1]; *In re Graven*, 101 B.R. 109 (Bankr. W.D. Mo. 1989). The District Court affirmed such Order on March 29, 1990. The District Court's Order was itself affirmed by the United States Court of Appeals for the Eighth Circuit in the case of *In re Graven*, 936 F.2d 378 (8th Cir. 1991) ("*Graven I*"). (App. p. 69a).

The Trustee filed, on June 22, 1989, a Complaint against the Debtors, Graven Auction Company, Inc., Bobby F. Graven as Trustee under the Bobby N. Graven Irrevocable Trust, and Will Fletcher. A Second Amended Complaint was filed by the Trustee against Bobby Noah Graven, Millie Ann Graven, Graven Auction Company, Inc., Bobby F. Graven as Trustee under the Bobby N. Graven Trust, Will Fletcher, Graven Realty, Inc., and

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[1] All references to the Appendix refer to the Appendix contained in the Petition for Certiorari.

Great Midwestern Investments, Inc., on September 1, 1989. (App. p. 125a). Millie Ann Graven died on September 28, 1989. Her personal representative, Bobby F. Graven, was substituted as a party in the adversary proceeding before the Bankruptcy Court. A hearing on said Second Amended Complaint was held on July 17, 1992, resulting in a Memorandum Opinion dated October 30, 1992 (App. p. 54a), and a Judgment dated November 2, 1992. (App. p. 58a). Such Judgment was in favor of the Trustee and against the Debtors and the Appellants herein.

A hearing on the issue of damages was held on December 3, 1992, resulting in a Memorandum Opinion (App. p. 62a), and Judgment (App. p. 67a), dated February 8, 1993.

A Notice of Appeal was filed by Graven Auction Company, Inc., Graven Realty, Inc., and Bobby F. Graven as Trustee under the Bobby N. Graven Trust on February 18, 1993. The United States District Court for the Western District of Missouri, Southern Division, Judge Scott O. Wright presiding, affirmed the Bankruptcy Court's decision in a Judgment (App. p. 53a) and Order (App. p. 40a) dated May 9, 1994.

A Notice of Appeal from the District Court's judgment was filed June 7, 1994. The United States Court of Appeals for the Eighth Circuit affirmed the lower courts in an Opinion and Judgment dated September 5, 1995. (App. p. 1a, 7a). *In re Graven*, 64 F.3d 453 (8th Cir. 1995) ("*Graven II*"). A Petition for Rehearing was filed with the Court of Appeals on September 18, 1995. (App. p. 8a). The Court denied the Petition in an Order dated October

10, 1995. (App. p. 25a). A Petition for a Writ of Certiorari was mailed January 8, 1996, by Petitioners but returned by the Clerk for failure to comply with the Supreme Court Rules. Petitioners again served a Petition for a Writ of Certiorari on Respondent on March 5, 1996.

ARGUMENT

QUESTION I

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT WHICH PETITIONERS SEEK TO HAVE REVERSED IS *IN RE GRAVEN*, 936 F.2d 378 (8TH CIR. 1991) AND NOT THE OPINION OF THE COURT OF APPEALS INVOLVED IN THE CURRENT APPEAL AND BECAUSE PETITIONERS WERE NOT PARTIES TO AND DO NOT HAVE THE RIGHT TO CONTEST SUCH PRIOR DECISION AND BECAUSE THE COURT OF APPEALS' OPINION *IN RE GRAVEN*, 936 F.2d 378 (8TH CIR. 1991) WAS AND IS CORRECT.

The first question Petitioners are seeking to present to this Court for review concerns whether or not the conversion of the original Chapter 12 bankruptcy proceeding to a case under Chapter 7 was proper. It should first be noted that Petitioners are not the Debtors in the underlying bankruptcy proceeding, but were Defendants in an adversary proceeding brought after such conversion. The Bankruptcy Court, Judge Frank W. Koger, entered his order converting the case to Chapter 7 and denying the Debtor's Motion to Dismiss in the case of *In re Graven*, 101 BR 109 (Bankr. W.D. Mo. 1989). (App.

p. 102a). Such order was subsequently affirmed by the District Court, as well as the United States Court of Appeals for the Eighth Circuit. *Graven I*, 936 F.2d 378 (8th Cir. 1991). (App. p. 69a). Respondent, the Bankruptcy Trustee in the underlying bankruptcy case, in an adversary proceeding filed subsequent to the conversion, obtained a judgment against the Debtors as well as Petitioners. The Petitioners subsequently appealed that judgment which was affirmed by the District Court and by the United States Court of Appeals for the Eighth Circuit. *Graven II*, 64 F.3d 453 (8th Cir. 1995). (App. p. 1a). It is for the last judgment of the United States Court of Appeals for the Eighth Circuit that Petitioners are now seeking a Writ of Certiorari. However, it is the first decision by the United States Court of Appeals for the Eighth Circuit that the Petitioners are seeking to reverse.

This Court ordinarily will not address issues which were not raised or resolved in the courts below. See *Taylor v. Freeland and Kronz*, 112 S.Ct. 1644, 1649 (1992); *U.S. v. Alvarez-Sanchez*, 114 S.Ct. 1599, 1605 n.5 (1994). In this case, petitioners did not raise any questions regarding the conversion of the bankruptcy case from Chapter 12 to Chapter 7 until the appeal was pending before the Court of Appeals. *Graven II*, 64 F.3d at 455. (App. p. 4a). Petitioners' argument regarding the application of 11 U.S.C. §§303(a) and 1208(e) was first made in Petitioners' Motion for Rehearing before the Court of Appeals. (App. 8a). As a result, the Court of Appeals determined that such issue was not properly before it and, therefore, did not address such issue in its opinion. *Graven II*, 64 F.3d at 455. (App. p. 4a). As a result, this Court should not grant certiorari because the question presented was not raised

in the Bankruptcy Court or District Court and was not passed upon by any of the lower courts.

In addition, the Petitioners were not the Debtors in the underlying bankruptcy case and are therefore not in a position to complain regarding the conversion of the Debtors' bankruptcy case from Chapter 12 to Chapter 7. Such conversion was affirmed by the United States Court of Appeals for the Eighth Circuit and is now a final, binding judgment on the Debtors. Petitioners are, in essence, seeking relief on behalf of the Debtors who did not appeal from the underlying adversary action and who are not in a position to attack the Eighth Circuit's decision affirming the conversion.

Petitioners argue that they should be allowed to raise these issues at any time because such issues are jurisdictional. Petitioners' argument is that because the Bankruptcy Court should have granted the Motion to Dismiss filed by the Debtors, there should not be any bankruptcy case and therefore no adversary action against Petitioners would be possible. Petitioners fail to realize that once jurisdiction is established as to the Debtors, jurisdiction over the adversary in which Petitioners were involved was proper in the Bankruptcy Court under 28 U.S.C. §§157(a) and 157(b).

In this case, two items result in jurisdiction as to the Debtors being proper in the Bankruptcy Court. First, the Debtors filed a voluntary Petition in Bankruptcy under Chapter 12 of Title 11. Thereafter, the Debtors' Motion to Dismiss was denied and the case was converted to Chapter 7 by the Bankruptcy Court. Such Order was affirmed by the District Court and by the Court of Appeals. As a

result, the validity of the conversion to Chapter 7 and the jurisdiction of the Bankruptcy Court over the Debtors has been finally decided against the Debtor.

Petitioners should not be allowed to argue that jurisdiction is not proper as to the Debtors. To allow non-Debtors, such as Petitioners, to attack the jurisdiction of the underlying bankruptcy over the Debtors, if such parties prevail, would result in a bankruptcy case existing as to the Debtors but being improper as to third parties which would prevent the collection of assets of the estate. The Bankruptcy Court would not be able to carry out its function. Once a Bankruptcy Court's jurisdiction over Debtors is established as to the Debtors, third parties should not be allowed to attack such jurisdiction in an attempt to avoid liability to the bankruptcy estate.

Finally, the conversion from Chapter 12 to Chapter 7 of the underlying bankruptcy case was proper. All of the appellate and district courts that have addressed this issue have reached the same conclusion as reached in *Graven I*. See *In re Foster*, 121 B.R. 961 (N.D. Tex. 1990) aff'd without opinion 945 F.2d 400 (5th Cir. 1991) cert denied 112 S.Ct. 972 (1992); *In re Neal*, 181 B.R. 560 (D.Utah 1995); see also *In re Goza*, 142 B.R. 766 (Bankr. S.D. Miss. 1992). In addition, the Eleventh Circuit indicated its agreement with such decision in the case of *In re Cotton*, 992 F.2d 311 (11th Cir. 1993). The Court in *Cotton* distinguished its case because there had been no allegations of fraud against the debtors. The Court, discussing *Graven I*, explained that it "involved charges of fraud which the Court was entitled to consider before entering a dismissal" pursuant to 11 U.S.C. §1208(b). *In re Cotton*, 992 F.2d at 313.

Petitioners are now claiming that because the Debtors objected to the conversion of Chapter 7, that such conversion constituted the commencement of an involuntary Chapter 7 bankruptcy against the Debtors. Since 11 U.S.C. §303(a) prohibits an involuntary Chapter 7 case against a family farmer, such as the Debtors, Petitioners claim the conversion was improper. A reading of §303 in its entirety makes it clear that Petitioners' argument is wholly unsupported. Such section provides, in part, that:

> (a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a monied, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.
>
> (b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title –
>
> > (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least $10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;
> >
> > (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by

> one or more of such holders that hold in the aggregate at least $10,000 of such claims;
>
> (3) if such person is a partnership –
>
> (A) by fewer than all the general partners in such partnership; or
>
> (B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or
>
> (4) by a foreign representative of the estate in a foreign proceeding concerning such person.

11 U.S.C. §303.

None of the actions which constitute commencement of an involuntary case under §303(b) were taken in this case. There is nothing in the code and Petitioners have cited no cases indicating that a conversion of a voluntary case under Chapter 12 to a case under Chapter 7 is the equivalent of the commencement of an involuntary Chapter 7 case under §303. The Debtors voluntarily subjected themselves to the jurisdiction of the Bankruptcy Court by filing a voluntary petition under Chapter 12 of Title 11 and were therefore subject to conversion under 11 U.S.C. §1208.

Petitioners' interpretation of 11 U.S.C. §1208 results in a requirement of the Debtors' consent before a case can be converted to Chapter 7 under §1208(d). A reading of the corresponding sections from Chapter 11 and 13 of Title 11 indicate that no such requirement was intended

by Congress. Section 1112 provides for either dismissal or conversion to Chapter 7 in certain situations. However, subsection (c) of that section provides that:

> The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a farmer or a corporation that is not a moneyed, business, or commercial corporation, unless the debtor requests such conversion.

11 U.S.C. §1112(c). Chapter 13 has a similar provision which provides:

> The court may not convert a case under this chapter to a case under chapter 7, 11, or 12 of this title if the debtor is a farmer, unless the debtor requests such conversion.

11 U.S.C. §1307(e). There is no provision in Chapter 12 which requires that the conversion to Chapter 7 be only on the debtor's request. If Congress had intended to limit the power of the court to convert a case under §1208(d), it could have easily included a provision similar to the ones included in Chapters 11 and 13. Petitioners would have this Court amend §1208 by adding such a provision. Such amendment is for Congress, not the courts, to make.

Petitioners, among other things, argued that allowing the conversion to Chapter 7 against the desires of the debtors/farmers would allow creditors to indirectly create an involuntary case where they cannot do so directly. The difficulty with Petitioners' argument is that in order to have conversion under §1208, the Debtors must have voluntarily filed a petition in bankruptcy under Chapter 12. As a result, the Debtors would have placed themselves voluntarily into bankruptcy where they are subject

to the provisions of §1208. Therefore, the only time a family farmer will be forced into a case under chapter 7 pursuant to that section is if the family farmer voluntarily files bankruptcy and it is then determined that such family farmer committed fraud in connection with the case. This is hardly the equivalent of an involuntary petition under §303.

As Petitioners did not raise any issue regarding conversion of the underlying bankruptcy case from Chapter 12 to Chapter 7 in either the Bankruptcy Court or the District Court and such issue was not passed upon in the Court of Appeals, such issue is not properly preserved for this Court's review. Further, Petitioners are seeking to reverse a decision of the United States Court of Appeals for the Eighth Circuit which was rendered in 1991 and which did not involve the Petitioners. Moreover, the Court of Appeals' decision in *Graven I*, 936 F.2d 378, is and was correct and Petitioners' arguments do not warrant review of that decision. As a result, the Petition for Certiorari should be denied.

QUESTION II

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS WERE NOT DEPRIVED OF THEIR RIGHT TO DUE PROCESS AND TO A FAIR TRIAL, PETITIONERS FAILED TO RAISE SUCH ISSUES IN THE LOWER COURTS, AND CONCURRENT FINDINGS OF FRAUD HAVE NOW BEEN MADE BY THREE LOWER COURTS AND THIS COURT SHOULD THEREFORE NOT REVIEW SUCH FINDINGS OF FACT.

Petitioners, in their second question presented, complained that they were denied due process and a fair trial because the courts had predetermined the issues involved in the adversary proceeding. However, the remedy Petitioners seek is the review of the Eighth Circuit's decision in *Graven I*, 936 F.2d 378, for allegedly misinterpreting the word "fraud" when affirming the conversion of the Debtors' Chapter 12 bankruptcy to a case under Chapter 7. While it is clear that Petitioners were not denied a fair trial or due process in this case, such denial would not provide justification for review or reversal of a decision by the Court of Appeals rendered over five and a half years ago in *Graven I*.

The Court of Appeals discussed the issues which were raised in the lower courts on this appeal. The Court explained:

> The defendants appealed to the district court. They raised four appeal points – two relating to the alterego determination and two dealing with the fraudulent transfer findings. The district court affirmed in full, finding that the alter-ego determination was not clearly erroneous and that the evidence fully supported the

> bankruptcy court's conclusion that the transfers were based upon actual fraudulent intent of the debtor. The defendants appeal.
>
> The Defendants have presented six issues on appeal: (1) Whether the district court erred in affirming the bankruptcy court's determination that the trustee proved fraud; (2) Whether the district court erred in affirming the judgment which was not "clear, definite, and certain"; (3) Whether the district court erred in affirming the judgment of the bankruptcy court converting the case from chapter 12 to chapter 7; (4) Whether the district court erred in affirming the bankruptcy court's denial of the Gravens' motion to dismiss the chapter 12 proceeding; (5) Whether the district court erred in affirming the bankruptcy court's finding that the transfers of assets from the Gravens to Graven Realty and Graven Auction were fraudulent transfers; and (6) Whether the district court erred in affirming the bankruptcy court's finding that transfers of stock from Graven Realty and Graven Auction to the Bobby N. Graven Irrevocable Trust were fraudulent transfers.
>
> The Defendants did not raise issues 2, 3, and 4 before the district court, and accordingly, those issues are not properly before this court here on appeal. (Citation omitted). Thus, the only issues the defendants have preserved for review are those relating to the fraudulent transfers.

Graven II, 64 F.3d at 455.

Petitioners did not argue in either the District Court or the Court of Appeals that they were denied due

process and a fair trial or that the issues in the underlying adversary action had been predetermined in *Graven I*. Prior to the Petition for Rehearing filed with the Court of Appeals, Petitioners had not even discussed *Graven I*. *Graven II*, 64 F.3d at 456. Since this question presented was not raised or resolved in the lower courts, this Court should refuse to address it by Writ of Prohibition. See *Taylor*, 112 S.Ct. 1644, 1649 (1992); *Alvarez-Sanchez*, 114 S.Ct. 1599, 1605 n.5 (1994).

Further, as discussed under Question I above, Petitioners herein are not the Debtors in the underlying bankruptcy case and are not in a position to attack the conversion of the bankruptcy case from Chapter 12 to Chapter 7. Such conversion was properly ordered by the Bankruptcy Court and subsequently affirmed by both the District Court and the Court of Appeals. That judgment is final and not open to attack in this proceeding.

As for Petitioners' claims of denial of due process and a fair trial, such claims are wholly unsupported by the record. Petitioners were given ample opportunity to present evidence regarding the adversary proceeding. However, the evidence presented during the adversary proceeding was almost identical to the evidence presented on the Motion to Convert Case to Chapter 7. As the Court of Appeals explained, when faced with the same legal issues and the same evidence, the courts will reach the same conclusion. *Graven II*, 64 F.3d at 455-56.

A finding of fraud, such as is involved in this case, is a question of fact. *Graven II*, 936 F.2d at 382. The United States Court of Appeals for the Eighth Circuit, like this Court, follows the "Two Court Rule" which means that

the court will not ordinarily review concurrent findings of fact made by two lower courts unless there is a showing of a very obvious and exceptional error. *Graven II*, 64 F.3d at 455; *Graver Tank and Mfg. Co. v. Linde Air Products Co.*, 69 S.Ct. 535, 538 (1949). Because Petitioners have not shown such a very obvious and exceptional error, the Court of Appeals determined that it need not review the arguments regarding fraud. The court, however, went on to determine that the finding of fraud was supported and correct. *Graven II*, 64 F.3d at 456. As a result, there have now been concurrent findings of fraud by three lower courts without any showing by Petitioners that such determinations are not correct. Further, on six different occasions, based on the identical evidence, the courts have determined that such evidence justifies a finding of fraud. As a result, this Court should not disturb such factual finding.

Petitioners cite to nothing in the record indicating that they were denied a fair trial or prevented from presenting any evidence. The Court of Appeals discussed how the evidence presented in this case justified the finding of fraud the same as such evidence justified the original conversion from Chapter 12 to Chapter 7. The court stated:

> Moreover, in our view, this case involves the same facts and the same legal standard involved in *Graven I*. While the bankruptcy code sections involved in the two cases are different – in *Graven I* the issue was whether under section 1208(d) the Gravens engaged in fraudulent activity that would justify converting the case from chapter 12 to chapter 7, and in this case the trustee seeks to recover fraudulent transfers under either section 548(a) or section 544(b) – the governing legal standards are identical. In

> *Graven I*, we looked to the legal standards for fraudulent conveyances under section 548(a)(1) and under Missouri law (applicable under section 544(b)) to determine whether the Gravens had engaged in fraudulent activity for the purposes of section 1208(d). Both section 548(a) and Missouri law define fraudulent conveyances as those conveyances made with the "intent to hinder, delay or defraud" creditors.
>
> In *Graven I*, we concluded that the evidence abundantly supported the lower courts' conclusions that the Gravens made the transfers with the "intent to hinder, delay or defraud" their creditors and that there was no error in converting the case from chapter 12 to chapter 7. 936 F.2d at 383-84. The findings of fraud in *Graven I* applied to the transfers from the Gravens to Graven Auction and Graven Realty, as well as to the transfers from Graven Auction and Graven Realty to the Bobby N. Graven Trust.
>
> The bankruptcy judge, who we affirmed in *Graven I*, reached the same conclusion in this case after reviewing the same facts and applying the same legal standards. The defendants have not attempted to distinguish this case from *Graven I*, nor have they even discussed *Graven I*. Thus, we conclude that *Graven I* is controlling authority in this case, and we affirm the findings and conclusions of the lower courts.

Graven I, 64 F.3d at 455-56 (footnote omitted).

It is clear from the Court of Appeals' opinion that Petitioners were not precluded from litigating the issues in this adversary proceeding. The court did not invoke either of the doctrines of Collateral Estoppel or Res Judicata. The Court simply applied the precedent found

in *Graven I*, 936 F.2d 378. Under identical facts and legal questions, the court did and should reach the same conclusion. Since Petitioners were not denied due process or a fair trial, and they are not in a position to attack the decision in *Graven I*, 936 F.2d 378, the Petitioners' Petition for Certiorari should be denied.

CONCLUSION

Because neither of the questions presented by Petitioners were raised or resolved in the lower courts and Petitioners are attacking a Judgment of the Court of Appeals in which they were not parties and there is no basis for setting aside the decisions of the lower courts in this case, the Petition for Writ of Certiorari should be denied. The Court of Appeals, in addressing Respondent's Request for Sanctions, stated that "this appeal closely borders on the frivolous" but, in its discretion, chose not to impose sanctions. *Graven II*, 64 F.3d at 456. As was the case before the Court of Appeals, Petitioners have presented nothing of merit for this Court's review.

Respectfully submitted,

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